IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

DEZMOND EMESON

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS

Respondents.

APPELANT'S REPLY BRIEF

THADDEUS P. MARTIN, ATTORNEY AT LAW
Thaddeus P. Martin, WSBA # 28175
Attorney for Appellant
thad@thadlaw.com

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A. RCW 49.60. et. seq. Must be Liberally Construed – Both as to Its Interpretation and Application.

Some things are worth repeating. RCW 49.60.010 provides:

> "This chapter shall be known as the 'law against discrimination.' It is an exercise of the police powers of the state for the protection of the public welfare, health, and peace of the people of this state, and the fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares the practice discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental or physical disability or the use of trained dog guide or service animal by a person with a disability are matters of state concern, **that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundations of a free Democratic society ...** (emphasis added).

The legislature has also directed that in order to further the lofty goals of this statutory scheme that the Washington law against discrimination (WLAE) must be "liberally construed":

> "The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof ... nor shall anything herein contained be construed to deny the right of any person to institute any action or pursue any civil or criminal remedy based on alleged violation of his or her civil rights ... .

When liberally construing this statute Appellate Courts are compelled to resolve questions of statutory construction by providing an interpretation which best advances the legislative purposes of eradicating

discrimination here within the State of Washington. *Bennett v. Hardy*, 113 Wn.2d 912, 928, 784 P.2d 1258 (1990). Our Supreme Court has recognized the public policies emanating from RCW 49.60 are so powerful that it can be a predicate for a public policy based tortious actions for wrongful termination in violation of public policy. In *Bennett v. Hardy*, *supra*, the Court found that it is a tortious violation of public policy to retaliate against somebody who opposes discriminatory practices. Similarly in *Roberts v. Dudley*, 140 Wn.2d 58, 993 P.2d 901 (2000) our Supreme Court found that wrongful termination based on discrimination against those possessing the characteristics set forth within RCW 49.60 in and of itself violates public policy.

To that end, the second quoted clause of RCW 49.60.020 (the no elections of remedies clause) must be liberally construed as per prohibiting the application of preclusion principals to claims brought pursuant to RCW 49.60. et. seq. Indeed that was the essence of our Supreme Court's holding in *Reese v. Sears, Roebuck and Co.* 107 Wn.2d 563, 577-78, 731 P.2d 497 (1987), overruled on other grounds by *Phillips v. City of Seattle*, 111 Wn.2d 903, 766 P.2d 1099 (1989), see also *Yakima County v. Yakima*

County Law Enforcement Officers Guild, 157 Wn. App. 304, 328, 327 P.2d 360 (2010). [1]

The state, which should be a model employer as it relates to discrimination issues (unfortunately it is not) appears to misunderstand the impact of the scope of the command of "liberal construction" and the impact of Washington's "substantial factor" burden of proof applicable such claims. The impact of such a burden of proof is best described within Justice Madsen's decent in the case which initially adopted such a standard, *Mackay v. Acorn Custom Cabinetry*, 127 Wn.2d 302 315 898 P.2d 284 (1995);

> "As I understand the majority opinion, this full panoply of relief is available if the plaintiff proves that a discriminatory reason was a substantial factor in the employment decision. 'Substantial factor' is a standard which permits a trier of fact to find liability even if the employee would have been fired in any event for legitimate reasons. Thus, under the majority's opinion, damages could be awarded for loss of employment even if the loss of employment would have occurred regardless of the unlawful discrimination."

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[1] The one case issued by this Court applying preclusion principals to a RCW 49.60 claim, *Carver v. State*, 147 Wn. App. 597, 197 P.3d 678 (2008) it nowhere mentions the *Reese* case nor the provisions of RCW 49.60.020. It goes without saying that if the goal is to eradicate discrimination the no election of remedies provision within RCW 49.60.020 must be liberally construed to allow the victim of discrimination to seek multiple and sometime overlapping avenues of redress. This is particularly so in a case, such as this one, where a federal district court judge refused to permit plaintiff to take a non-suit and never address the fully developed merits of the underlying claim.

Thus, as recently explored by our Supreme Court in *Scrivener v. Clark College*, 181 Wn.2d 429, 447, 34 P.3d 541 (2014) even if legitimate motives exists for an unlawful employment decision does not end the inquiry because an employee can still prevail if an illegitimate motive was also a substantial factor in the decision. In *Scrivener*, there is no requirement that the employee disproved any of the employer's articulated reasons for its actions, but rather the plaintiff's burden of proof at trial to prove discrimination was a substantial factor in an adverse employment action, not the only motivating factor. *Scrivener*,181 Wn.2d at 447.

Thus, even if we assume that preclusion principals can have application in an RCW 49.60. et. seq. case (a doubtful proposition), under a "substantial factor" standard, the state's argument that Mr. Emeson's disparate treatment claims are precluded because "Judge Bryan's ruling established that DOC had a legitimate nondiscriminatory reason for its actions misses the mark. Under substantial factor test the existence of "legitimate reasons" does not end the inquiry because such a finding a does not preclude the determination that there may have also been illegitimate motivations which came into play. The same is true with respect to Appellant's, obviously, extremely meritorious retaliation claim under RCW 49.60.210. See, *Allison v. Housing Authority*, 118 Wn.2d 79,

85-96, 921 P.2d 34 (1991) (substantial factor test applies to retaliation claim under RCW 49.60.210). (See Respondent's Brief Page 27).

Given such standards, this Court also should reject the notion that DOC "reasonably accommodated" Mr. Emeson. (Respondent's Brief Pages 34-36). It is not "reasonable" accommodation to place an employee who suffers from a brain injury into a position where he is constantly and mercilessly harassed by his supervisor.

Along the same lines, it is noted that DOC's statute of limitation equally lacks merit. As a factual detail set forth within actual recitation which is **fully cited to the record below, it shows that the harassment directed toward Mr. Emeson was so constant that it could be characterized as a "pattern" of discriminatory harassment.** The DOC's characterization of such a pattern of harassment to be nothing more than a lot of "discreet acts of discrimination" is preposterous and clearly contrary to the teaching of *Antonius v. King County*, 153 Wn.2d 256, 61-62, 103 P.3d 729 (2004) and its progeny. *Cox v. Oasis Physical Therapy, PLC*, 153 Wn. App. 176, 195, 222 P.3d 119 (2009) (" ... a hostile work environment claim, the objectionable practice does not occur on a particular day. Thus, conduct throughout the time the acts occurred could be considered if the plaintiff rendered evidence that one or more acts took

place within 3 years of when the claim was filed."). Clearly the evidence presented by the plaintiff meets such a test.

In sum, the Trial Court clearly erred in dismissing plaintiff's discrimination claims based on RCW 49.60.

B. The Trial Court Erred in Dismissing Appellant's Invasion of Privacy Claim.

DOC's suggestion that "Facebook" is not a public forum appears to be somewhat ludicrous. Clearly a Facebook account can be "public" and it should be a question of fact for the jury to determine whether Ms. Phelps sufficiently distributed such information to her "friends" as to constitute "publicity".

Further, whether or not such conduct is sufficiently related to Ms. Phelps' employment is controlled by the Supreme Court's opinion in *Robel v. Roundup Corp.*, 148 Wn.2d 35, 53-4, 59 P.3d 611 (2002). In *Robel,* the Supreme Court found that it was a question of fact as to whether or not an employer should be held liable for a supervisor's "outrageous" conduct (an intentional tort). In *Robel*, the Supreme Court provided the following analysis that appellant cannot improve upon:

> "Fred Meyer argued to the Court of Appeals that 'in Washington an employer is generally not, as a matter of law, liable for an intentional tort committed by an

> employee. Citing *Kuehn v. White*, 24 Wn. App. 274, 278, 600 P.2d 679 (1979). This point of view greatly distorts the law of vicarious liability in the state. Our case law makes clear that once an employee's underlying tort is established, the employer will be held vicariously liable if 'the employer was acting within the scope of his employment.' An employer can defeat a claim of vicarious liability but showing that the employee's conduct was (1) intentional or criminal **and (2) outside the scope of employment.** *Niece v. Elmview Group Home*, 131 Wn.2d 39, 56, 929 P.2d 420 (1997), quoted with approval in *Snyder v. Med. Servs. Corp. of E. Wash.*, 145 Wn.2d 233, 2-43, 35 P.3d 1158 (2001). *Niece* and by extension, *Snyder* simply do not stand for the proposition that intentional or criminal conduct is per se outside the scope of employment. ... an employee's conduct would be outside the scope of employment if 'it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.' This is not to say that an employer will be vicariously liable only where it has specifically authorized an employee to act in an intentionally harmful or negligent manner; likewise, an employer may not insulate itself from vicarious liability merely by adopting a general policy describing bad behavior that otherwise would be actionable. **The proper inquiry is whether the employee is fulfilling his or her job functions at the time he or she engaged in the injurious conduct.**" ... (edited for clarity) (citations omitted).

Under *Robel*, the Court could look to the relationship between the parties, the location where the actions occurred and whether or not there is a sufficient causal connection between work and the alleged intentional conduct.

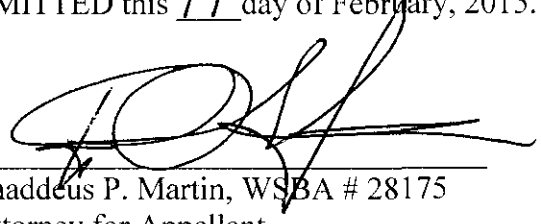
Here, Ms. Phelps' conduct related to work and information she gathered in the work environment which she was using abusively. It was

directed towards a coworker. It should be left to the jury to decide whether or not DOC should be liable for such conduct under vicarious liability principals.

CONCLUSION

For the reasons stated in Appellant's Opening Brief and above, the decision of the Trial Court dismissing this case should be reversed and this matter remanded for a full trial. There are clearly questions of fact with respect to plaintiff's discrimination claims brought pursuant to RCW 49.60. Additionally, plaintiff has a colorable and proper invasion of privacy claim which should be appropriately considered by the jury.

RESPECTFULLY SUBMITTED this 19 day of February, 2015.



Thaddeus P. Martin, WSBA # 28175
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I AM NOT A PARTY TO THIS ACTION AND THAT I PLACED FOR SERVICE OF THE FOREGOING DOCUMENT ON THE FOLLOWING PARTIES IN THE FOLLOWING MANNER(S):

Garth Ahearn
Attorney General's Office
1250 Pacific Ave, Ste 105
Tacoma, WA 98402

[XXX] by causing a full, true, and correct copy thereof to be E-MAILED to the party at their last known email address, per prior agreement of the parties, on the date set forth below followed by legal messenger.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Lakewood, Washington on the 19th day of February, 2015.

Kara Denny

Kara Denny, Legal Assistant